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(I)



# **In the Supreme Court of the United States**

OCTOBER TERM, 1940

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No. 459

C. H. DUNN, PETITIONER

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA*

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## **BRIEF FOR THE RESPONDENT IN OPPOSITION**

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### **OPINION BELOW**

The District Court did not render any opinion. The opinion of the Court of Appeals (R. 7-11) is not yet reported.

### **JURISDICTION**

The judgment of the Court of Appeals sought to be reviewed was entered June 28, 1940 (R. 12). Motion for rehearing or modification of the opinion and judgment was denied July 30, 1940 (R. 14). The petition for writ of certiorari was filed September 24, 1940. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether, under the facts of this case, the Secretary of the Interior may be compelled to hear and determine, or in the alternative to grant, an application for a lease under Section 17 of the General Leasing Act.

#### STATUTE INVOLVED

Section 17 of the General Leasing Act as amended by the Act of August 21, 1935, c. 599, 49 Stat. 674, 676-677 (30 U. S. C. Supp. V, Sec. 226), provides—

All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits, except as herein otherwise provided, may be leased by the Secretary of the Interior \* \* \* to the highest responsible qualified bidder by competitive bidding under general regulations. \* \* \*

*Provided further,* That the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field who is qualified to hold a lease under this Act \* \* \* shall be entitled to a preference right over others to a lease of such lands without competitive bidding \* \* \*.

#### STATEMENT

Petitioner instituted this suit in the District Court seeking an order in the nature of mandamus

against the Secretary of the Interior, respondent herein. In substance, the complaint alleges the following facts:

On or about August 18, 1938, petitioner filed with the Register of the United States Land Office at Los Angeles an application for an oil lease on a certain area in California. After rejection of the application by the Register, petitioner appealed to the Commissioner of the General Land Office, who refused to upset the ruling of the Register. Thereafter petitioner appealed to the Secretary of the Interior but the Secretary has not yet acted upon the appeal nor has he held a hearing on the application notwithstanding petitioner's requests for a hearing (R. 2-3). The complaint specifically alleges that the respondent has "through his Under Secretary, denied or indefinitely postponed a hearing \* \* \* and refused and failed to act" upon the application. The complaint prays that respondent be required immediately to grant petitioner a hearing upon the application and speedily thereafter to act upon it or, in the alternative, to issue the lease (R. 3).

The Secretary filed a motion to dismiss (R. 3), which was granted (R. 4). The Court of Appeals affirmed (R. 12).

#### ARGUMENT

The decision below is plainly correct. There are no conflicts, and no question warranting further review is here presented.

1. At the very outset it should be noted that Section 17 accords preferential treatment without competitive bidding to the first applicant only where the lands are "not within any known geologic structure of a producing oil or gas field". And since the complaint fails to allege that the lands in question are of such character,<sup>1</sup> it is fatally defective for that reason alone.

2. But, in any event, the statute is couched in terms of permissive language; it provides merely that the lands "may be leased" by the Secretary. Plainly, this is not the language of command. *Farmers Bank v. Federal Reserve Bank*, 262 U. S. 649, 662-663; *Railroad Co. v. Hecht*, 95 U. S. 168, 170. As the court below held in *United States v. Ickes*, 101 F. (2d) 248, 251-252:

The language of sec. 17, as amended, including the \* \* \* proviso, is clearly permissive. Lands which are known or believed to contain oil or gas deposits *may be leased* but language is lacking making it the duty of the Secretary to execute a lease. The \* \* \* proviso entitles a qualified applicant to a preference right to a lease on

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<sup>1</sup> The complaint simply alleges that petitioner has made a "due and proper application" for the lease in question (R. 2). That allegation, however, can hardly mean anything more than that petitioner has complied with the various procedural or formal requirements relating to the filing of the application. The Court of Appeals did not pass upon this point, but simply assumed "without deciding" (R. 8) that the allegation was sufficient.

lands not within any known geologic structure of a producing oil or gas field, but, in no respect places a duty upon the Secretary to execute a lease. The act does not say that the applicant is entitled to a lease. Rather, it specifically states that he "shall be entitled to a preference right over others to a lease of such lands without competitive bidding." In other words, the mere filing of the application, when the statute does not place a duty upon the Secretary "beyond peradventure clear", gives plaintiff no such vested interest as would leave a single remaining duty upon the Secretary, which may be commanded by mandamus \* \* \*.

However, the precise meaning of Section 17 is not here involved, but rather whether its language is so plain as to amount to a positive command to respondent. Only in the latter event does Section 17 impose a ministerial duty, the performance of which can be compelled. *Wilbur v. United States*, 281 U. S. 206, 218-221; *Interstate Commerce Commission v. New York, N. H. & H. R. Co.*, 287 U. S. 178, 203-204. As stated in *United States v. Wilbur*, 283 U. S. 414, 419-420:

It is unnecessary now to declare the precise meaning of the relevant provisions of the Act. \* \* \* Under the established rule the writ of mandamus cannot be made to serve the purpose of an ordinary suit. It will issue only where the duty to be performed is ministerial and the obligation to

act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable \* \* \*.

Petitioner ascribes no such certainty to her construction of Section 17.

3. Petitioner's demand for an immediate hearing is equally without merit. As the court below pointed out (R. 11, n. 8), petitioner's complaint carefully avoids any charge that respondent's conduct has been arbitrary or capricious. And it may well be that (R. 9) "under many circumstances withholding action on such applications for a rather extended period would be eminently proper, if not essential to wise administration." In the absence of allegations to the contrary it must be presumed that the Secretary of the Interior properly discharged his official duties and withheld his decision on petitioner's application for a good and sufficient reason. *United States v. Chemical Foundation*, 272 U. S. 1, 14-15.

#### CONCLUSION

It is respectfully submitted that the petition should be denied.

FRANCIS BIDDLE,  
*Solicitor General.*

OCTOBER 1940.

